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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, AND LUTHER W. HIGH,

Appellants,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH, AND T. R. SNAVELY, AS MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

STATEMENT AS TO JURISDICTION.

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Appellants,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH, AND T. R. SNAVELY, AS MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JURISDICTIONAL STATEMENT OF APPELLANTS

The Highland Farms Dairy, Incorporated, a corporation, and Luther W. High, appellants, applicants herein for an appeal to the Supreme Court of the United States from the order of the District Court of the United States for the Eastern District of Virginia dated and filed on the 24th day of October, 1936, in accordance with the requirements of

Rule 12, Paragraph 1 of Rules of the Supreme Court of the United States (as amended March 2, 1936), herewith present this separate typewritten statement as to the jurisdiction of the Supreme Court of the United States.

I.

Basis Upon Which it is Contended that the Supreme Court of the United States Has Jurisdiction Upon Appeal to Review the Order in Question.

The order of the District Court of the United States for the Eastern District of Virginia, dated and filed on the 24th day of October, 1936, herein, is a final order in a suit in which the appellants sought a permanent injunction restraining the enforcement, operation and execution of a statute of the State of Virginia and certain rules and regulations made pursuant thereto on the ground that they were repugnant to the Constitution of the United States.

II.

The Statutory Provision Believed to Sustain the Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the order in question is Section 266 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, United States Code Annotated, Title 28, Section 380.

III.

The Statute of the State of Virginia, the Validity of Which is Involved.

The statute of Virginia, the validity of which is involved, is an act of the General Assembly of Virginia, approved March 29, 1934, Official Volume, Acts of General Assembly

of Virginia, 1934, Chapter 357, page 558. The complete statute and the rules and regulations adopted pursuant thereto are attached hereto as Appendix A.

IV.

Date of Judgment Sought to be Reviewed and of Application for Appeal.

The order of the District Court of the United States for the Eastern District of Virginia sought to be reviewed was dated October 24, 1936.

The application for appeal was presented on the 6th of November, 1936.

V.

Nature of the Case and the Ruling of the Court Bringing the Case Within the Jurisdiction of Provisions Relied on.

Highland Farms Dairy, Incorporated, a corporation, operates a milk depot or creamery in the City of Washington, purchasing milk therefor from producers in the District of Columbia, State of Maryland and State of Virginia, and sells its entire output of bottled milk to the appellant, Luther W. High, sales being made in the City of Washington. The individual appellant, Luther W. High, is engaged in the business of operating retail stores for the sale and distribution of milk acquired from the corporate appellant.

The statute above referred to, which we may hereafter refer to as the Milk Act, while containing in the preamble thereof declarations of the existence of emergency conditions in the production, distribution and sale of milk requiring supervision and control in the exercise of the police powers of the State, was not made effective by the Act at any time or place within the State, but where and when the

authority and control provided for in the Act is to be exercised shall be determined by a Milk Commission created by said Act. While the Legislature declared an emergency it left to the Milk Commission the right to really determine whether there was an emergency and where in the State it would be found to exist.

The purpose of the Act is to provide for regulation of the prices of milk. While it is stated in the preamble, in support of the police powers and regulation, that the Act is "to promote the public welfare, public health and public peace," a consideration of the then existing law and provisions of this enactment clearly indicate that the objective was economic and an effort to control prices in the supposed interest of the producers. The statute complained of is not an act of the legislative body determining the existence of an emergency, but is a delegation of the authority to a Milk Commission to determine where, when, if at all, an emergency exists. After establishing areas, prices and regulations, pursuant to such authority, there is the further delegation of power to determine an emergency in the right given a majority of the producers and distributors (in volume of milk) to themselves to require the complete annulment with respect to any area established (Subdivision i, Section 3 of the Act).. The Act fixes no definite time for the termination of the Act but the legislative body provided an *utterly unnecessary provision that* by joint resolution the legislative body might designate the termination, and then made an extraordinary delegation of legislative authority to the Governor to terminate the same by proclamation, regardless of any conditions (Section 17 of the Act).

To the Milk Commission the Act gives power, without fixing any standard whatever, to determine who may have or who may not have license to produce and distribute milk in any territory, and after the grant of license, to suspend

or withdraw licenses theretofore granted. The Milk Act undertakes to control the purchase by distributors in the area to be defined by the Milk Commission from persons not licensed as required by the Act who may be beyond the State, and so interferes with interstate commerce.

Pursuant to the authority granted in said Act, the Milk Commission established the Arlington-Alexandria Milk Market area, prescribed minimum prices and certain rules and regulations relating to the production and distribution of milk in said milk market and sought to enforce the same against the appellants. The corporate appellant and the individual appellant thereupon filed their bill in the District Court of the United States for the Eastern District of Virginia asking relief from the enforcement of the said Act and the rules and regulations made pursuant thereto by the Milk Commission, on the ground of the unconstitutionality of said statute and the rules and regulations made pursuant thereto because said Act was in violation of the Fourteenth Amendment to the Constitution of the United State, in violation of Section 40 of Article IV of the Constitution of Virginia, and in violation of Article I, Section 8, of the Constitution of the United States, and on the further ground that the action of the Milk Commission in establishing the market area and fixing prices was not had pursuant to the requirements of the Act. The appellants in their bill asked for a temporary restraining order. The temporary restraining order was refused upon assurance from the defendants that no effort would be made to enforce the Act and the rules and regulations until the application for an interlocutory injunction could be heard. Whereupon, by order of the District Court of the United States for the Eastern District of Virginia, a hearing and determination of the application were directed to be had before a court consisting of three judges as provided in Section 266 of the Judicial Code, as amended (28 U. S. C. A.;

Section 380). Thereafter, the application for an interlocutory and final injunction came on to be heard upon agreement and upon stipulation of facts.

By the order of the 24th day of October, 1936, the injunction was refused and the bill dismissed.

VI.

Grounds Upon Which it is Contended the Questions Involved are Substantial.

A. The Appellants Contend that the District Court Erred in Holding that the Act of the General Assembly of Virginia, Known as the Milk and Cream Act, Was a Proper Exercise of the Police Power of the State.

In support of this claim it is contended:

First, that the General Assembly of Virginia was not authorized in the exercise of police power to regulate the price of milk except in the event of a recognized public emergency; and

Second, that while the legislative act involved in the preamble declared that an emergency existed calling for the exercise of the police power, the Act upon its face leaves entirely open the question of an emergency and delegates the determination of the existence of the emergency to an administrative board.

The decision of the District Court* was based upon the authority of the decision of the Supreme Court of the United States in *Nebbia* v. *New York*, 291 U. S. 502, in which the constitutionality of the New York Milk Act was involved,

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* Pursuant to the provisions of the Rules of this Court, Rule 12, Paragraph 1, Appellants append hereto, marked "Appendix B", a copy of the opinion rendered in the District Court.

and the decision of the Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission of Virginia*, 163 Va. 957, in which the constitutionality of the Virginia Milk and Cream Act was upheld by a divided court of four to three in support of the validity of the Act, after a rehearing upon the first decision in which the court stood five to one against the validity of the Act.

In view of the opinion of this Court in the *Nebbia* case and the subsequent decisions in *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, and *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, the right of a State legislative body to control and regulate the price of milk is dependent upon the existence of an emergency calling for the exercise of this extraordinary power. That Government regulation in the shape of price-fixing in private business as opposed to public utilities or monopolies can be justified only by the existence of emergency conditions has been established in the repeated decisions of this Court, as was said by the court in *Wolf Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailer, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."

On the contrary, under normal conditions price-fixing of the products of private business, including milk, has been declared unconstitutional. *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Tyson et als.* v. *Banton*, 273 U. S. 418. And in *New State Ice Company* v. *Liebmann*, 285 U. S. 262, dealing with the attempt of a State to control the manufacture and sale of ice, this Court held that this business was private

and not affected with a public interest, and likened it to "the business • • • of the grocer, the *dairyman*, the butcher or the baker."

In the *Nebbia* case it seems clear from the opinion of Mr. Justice Roberts that only when the conditions or practices make "unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public or portend the destruction of the industry" then the State may regulate the prices to be charged for the products or commodities of the business subject to the police power.

As Mr. Justice Holmes said:

> "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (*Block* v. *Hirsh*, 256 U. S. 135, 157.)

When the *Nebbia* case was before the Court of Appeals of New York, in *People* v. *Nebbia*, 262 N. Y. 259, that court distinguished *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, saying:

> "The New York law creates no monopoly; does not restrict production; was adopted to meet an emergency; milk is a greater family necessity than ice."

In *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, in considering the validity of a feature of the New York Act not dealt with in the *Nebbia* case, this Court recognized the peculiar conditions which justified the enactment of the New York Milk Act, and in *Borden's Farm Products Co.* v. *Ten Eyck*, 80 L. Ed. 469 (1936), after the hearing directed in *Borden's Farm Products Co.* v *Baldwin, supra*, in the light of conditions found by the trial court to exist in New York in 1934, the Supreme Court upheld the constitutionality of the differential permitted by

the New York Milk Control Act of 1933, but the court adverted to the price-fixing provisions as "a temporary expedient to redress an injurious economic condition" and referred to the decision in the *Nebbia* case, as follows (p. 473):

> "We have held that article (the Fourteenth Amendment) does not prevent the fixing of maximum and minimum prices for milk, in the circumstances existing in New York in 1933."

In the opinion of this Court holding the New York Minimum Wage Law violative of the due process clause of the *Fourteenth Amendment, Morehead* v. *New York,* 80 L. Ed. 921 (1936), the court said of the invalid statute, at p. 928:

> "The Act is not to meet an emergency, it discloses a permanent policy; * * *"

From these decisions of this Court, we submit that the right of the State to regulate and control the price of milk was upheld on the basis of the finding of fact which justified a regulation to meet an emergency.

The Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission, supra,* approved the Act as an emergency legislation declaring, at page 968, that it was not necessary for the court to apply the principle of regulation in its broadest aspect. Whether in the exercise of the police power, independent of special conditions which might be deemed an emergency, the State has the power to regulate the price of milk was not decided by the court in the *Nebbia* case nor was it decided by the Supreme Court of Appeals of Virginia in the *Reynolds* case, but in both opinions the question is left open.

The Virginia Milk and Cream Act, while its preamble declares an emergency, cannot be justified as emergency legislation because the Act upon its face in its express

provisions leaves entirely open the question of an emergency and delegates the determination of the existence of the emergency to an administrative board.

The Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission,* 163 Va. 957, in its final and divided opinion, reversing upon reargument its former opinion, relied upon the decision of this Court in the *Nebbia* case with a statement that the Virginia Milk and Cream Act was substantially like the New York Act which had been passed upon by this Court. The important differences apparently were not presented to the Court and were not considered. The question of whether the General Assembly of Virginia had in fact delegated the power to a Commission to determine the existence of an emergency was not considered and, apparently, not presented to the Court. The litigation in which that decision was made was brought by the Milk Commission and the parties now before the court in this proceeding were not parties in the case before the Supreme Court of Appeals of Virginia. This Court is not bound by the interpretation of the Court of Appeals of Virginia of the Act in matters which were not decided by that Court. The learned Judge of the District Court was in error in declaring his acceptance of the construction of the Supreme Court of Appeals of Virginia as to the provisions dealing with the delegation of the power to determine an emergency because that Court did not make any declaration of the construction as to these provisions and because the issue was not presented to the Court or considered by it.

The decision of the Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission, supra,* is not conclusive either of the sufficiency of the legislative declaration or the validity of the law enacted to meet such an emergency as was declared, first, because neither the legislative decla-

ration or the sufficiency thereof, nor the delegation to the Milk Commission to determine in fact the existence of the emergency, was challenged in that case; and secondly, because the decisions of the State court are not conclusive upon the question of the constitutionality of State legislation under the Federal Constitution. While the question of the right of the General Assembly of Virginia to delegate to the Commission the power to determine where and when the emergency, if any, exists and the remedy which should be applied, might have been raised, they were not raised and disposed of. And, as Mr. Justice Sutherland said, in *Webster* v. *Fall*, 266 U. S. 507, page 511:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

It is, therefore, submitted that the substantial question exists and is here presented as to whether the Virginia Milk and Cream Act violates the Fourteenth Amendment of the Constitution.

While the General Assembly of Virginia, in the preamble of the Act referred to, declares the existence of conditions justifying the extraordinary exercise of the police power, when the Act is considered its express provisions show that in point of time and place the duty to determine the existence of an emergency is in fact left to the Milk Commission. Under Subdivision (i) of Section 3, the creation of a market, whether there shall be any market area and any regulation at any time or place, are left to the Milk Commission. The second paragraph in this Subdivision (i) of Section 3 provides that the Commission may withdraw the exercise of its powers from any market at any time and place, and the last paragraph of Subdivision (i) of this Section leaves the determination of the exercise of this emergency power to

the will of a majority of the producers and distributors, measured by volume of milk, in any market established. Under the Virginia Milk and Cream Act no regulation is fixed as to time or place within the State but the entire matter of whether the Act should be made effective is to be determined at any time and in any area within the State as the Milk Commission may declare; and if and where a market area is established the continuance of the area and the regulation provided is left entirely to a majority of the producers and distributors (in quantity of milk). Under this latter provision there is presented the full opportunity for the creation of an uncontrolled monopoly. Two parties, as appears from the record in this case, parties who are producers and distributors in the area established, could by virtue of their production and distribution of the majority of milk handled in the area, make an end of any regulation. Such provisions for the delegation of the determination of the question of emergency were not present in the New York Milk Control Act, nor in any other State act so far as we have been able to discover. The authority of the legislative body to delegate the determination of the existence of the emergency to a Commission was not therefore before this Court in the *Nebbia* case in dealing with the New York Milk Control Act, and these defects in the Virginia Act were not dealt with in the opinion of the Supreme Court of Appeals of Virginia.

No area of emergency is defined in the Virginia Milk and Cream Act, nor is there any mandate to the Commission to define such area or to exercise its powers in any area of its determination, but such authority is permissive only and, as has been pointed out, limited upon the will of a majority of producers and distributors in quantity of milk in any given area whose opposition to the regulations of the Com-

mission is made final, irrespective of any emergency or regardless of the relief of conditions of the nature proclaimed by the General Assembly of Virginia.

Finally, the Act bears no definite time limit. Section 17 provides that the period of public emergency shall continue at the fancy of the State "until such date as the Legislature by joint resolution may designate to be the termination thereof" or "the date so designated by a proclamation of the Governor." The Virginia Milk and Cream Act alone, among the several state milk control acts which have been considered by the courts, fails to specify a definite period of emergency. Wholly unlike the New York Milk Control Act in this respect, the Virginia Act manifests a permanent policy in the same fashion as the New York Minimum Wage Law which was held unconstitutional in *Morehead* v. *New York*, 80 L. Ed. 921 (1936), subsequent to the *Nebbia* case.

The termination by proclamation of the Governor is a wholly unwarranted delegation of legislative authority. There is no fact to be found, condition to be determined as a precedent to the Act of the Governor, but it is left entirely in his power to annul this Act of the General Assembly. The Act clearly comes within the condemnation declared in *Worthen Co.* v. *Thomas*, 292 U. S. 426, dealing with the statute of the State of Arkansas, when it declared:

> "The legislature sought to justify the exemption by reference to the emergency which was found to exist. But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief. • • • the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction."

B. It is Contended that the District Court Erred in Failing to Hold that the Virginia Milk Act was Invalid as an Improper Delegation of Legislative Power to the Milk Commission and in not Holding that the Powers Conferred Upon the Commission Involved a Denial of Equal Protection of the Laws and a Denial of Due Process in Contravention of the Fourteenth Amendment to the Constitution of the United States.

In support of this contention the appellants say that the Virginia Milk Act is defective in the delegation of authority to fix prices without any fixed standard or measure being prescribed. As declared by the Court of Appeals of Virginia, and abundantly appears upon the fact of the Act, the statute is essentially an economic measure looking to the control of prices as the essential consideration. As a necessary incident to this it undertakes to control all parties who may engage in the business by requiring the parties, producers or distributors, to secure a license from the Milk Commission. The absence of any standard for the establishment of the markets, the price-fixing, issuance and revocation, suspension or refusal of license, condemns the whole act. Without the provision for control through price-fixing, and without the provision for regulation of the parties in the business by issuance, refusal, suspension or withdrawal of licenses, the Act becomes a mere shell. In its aspects, both as to price-fixing and issuance of licenses, the Virginia Milk Act is not substantially the same as the New York Milk Act dealt with in the *Nebbia* case, but is different in essential provisions. While in the Virginia Milk Act the Commission is authorized to inquire into the various matters and is given a wide scope in investigation, the only suggestion of limitation is in Subdivision (j) of Section 2 of the Act, as follows:

> "In determining the reasonableness of prices to be paid or charged in any market or markets for any

> grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage, and delivery charges, the prices of other foods, and the welfare of the general public."

There is not, as in the New York Act, the provision that "the board shall take into consideration all conditions affecting the milk industry, including the *amount necessary to yield a reasonable return* to the producer and to the Milk dealer."

The Virginia Milk Act has clearly omitted an essential element in the fixing of prices for service or commodities. The learned Judge of the lower court was in error in his suggestion that this was provided for in the Virginia Milk Act.

Again, the Virginia Milk Act is not substantially the same but differs from the New York Act in essential particulars in regard to the issuance, suspension and revocation of licenses. Section 4 of Article II of the Act provides that no distributor shall buy or sell milk unless such distributor is duly licensed, and that it shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed, while Subdivision (k) of Section 3 of Article II provides:

> "The Commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing."

Section 5 provides that the application for a license to operate may be by mail or otherwise, but there is absolutely no statement as to what the conditions are upon which the license should be issued or refused, or when issued be revoked.

On the other hand, in the New York Act, Subdivision 2, Section 308, there is full and explicit statement of the conditions to be complied with by the applicant for a license, concluding with the express declaration:

> "A license shall be granted to the applicant by the board subject to the provisions of this article."

Then follows Subdivision 3 of this Section 308 which prescribes that the "board may decline to grant a license or may suspend or revoke a license already granted upon due notice and opportunity of hearing to the applicant or licensee when satisfied of the existence of any of the following." Then follow paragraphs, from (a) to (k) inclusive, setting forth explicitly the conditions which shall guide the board in refusing or suspending or revoking a license.

The Court of Appeals of Virginia in its divided opinion, 163 Va. 957, said (p. 977):

> "The license provision of the Virginia Act is not challenged in this proceeding. However the Act provides that refusal or revocation of the license may be reviewed by this court."

The original opinion, which was overruled on rehearing but which became the dissenting opinion of the three judges, did, however, expressly condemn the Act because of the grant of this arbitrary power to the Milk Commission as an improper delegation of legislative power and substituting government by men rather than by law. In the opinion of the learned Judge of the District Court this contention is disposed of by an interpretation of the Virginia Act as meaning that the power is not to be exercised arbitrarily or capriciously.

That the delegation of legislative function to an administrative body to regulate prices without fixing a standard or measure by which the board is to be guided is improper

may not be questioned. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Corporation* v. *United States*, 295 U. S. 495. That a law which undertakes to vest in an administrative board arbitrary discretion with regard to an ordinary lawful business without prescribing a uniform rule of action is unconstitutional has been settled by this Court. *Yick Wo* v. *Hopkins*, 118 U. S. 366; *Barbier* v. *Connolly*, 113 U. S. 27; *Wichita Railway & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59; *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 245; *Eubank* v. *City of Richmond*, 226 U. S. 137.

This rule is well settled in Virginia as will appear from the decisions of the Supreme Court of Appeals of Virginia as follows: *Thompson* v. *Smith*, 155 Va. 367, 379; *Taylor* v. *Smith*, 140 Va. 217. The final opinion in *Reynolds* v. *Milk Commission, supra*, makes no reference to these decisions, while the dissenting opinion relies upon them.

In the opinion of the learned Judge of the District Court, upon which the order complained of here rests, acceptance of and reliance upon the decision of this Court in the *Nebbia* case followed a like acceptance by the Supreme Court of Appeals of Virginia upon the view that the New York Act and the Virginia Act were substantially the same. In the opinion of the Court of Appeals of Virginia the essential differences, to which attention is here directed, were not considered. In the opinion in the District Court, upon which the order complained of is based, there is no consideration of the essential difference with respect to measure or standard of price-fixing, in the New York Milk Act and the Virginia Milk Act. The learned Judge, while recognizing that no other Milk Control Act contains conditions of "like breadth", disposes of the contention with respect to the unlimited grant of power, in the issuance or withdrawal of licenses, by declaring in effect that the words of

the Act are not to be accepted but are to be interpreted, though no interpretation is necessary. The opinion recognizes that such a grant of power in the terms of the Act would be invalid and the attempt to exercise the arbitrary power would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. He suggests, to meet this situation, that it is not to be assumed that the Legislature granted arbitrary power but there is no room for interpretation. The General Assembly of Virginia did grant the power in unlimited and unrestricted terms.

The decision of the learned Judge of the District Court as to the validity of the unlimited control as to the issuance and suspension or revocation of license to conduct the milk business rests upon the decision of this Court in *Lieberman* v. *Van Der Carr*, 199 U. S. 552, in which was involved the validity of the provision in the Sanitary Code prohibiting the sale of milk without a permit "in writing from the Board of Health and subject to the conditions thereof." The Court of Appeals of New York sustained the provision as a grant of power to issue or withhold permits in the honest exercise of a reasonable discretion. The provision of the Sanitary Code was strictly a health measure and the discretion was clearly limited by conditions looking to the promotion of health, the essential requirements of which being well recognized. The Sanitary Code was directed to the securing of a supply of milk to meet the standard of healthy milk. The Virginia Milk Act, while referring to health and general welfare, was recognized by the Supreme Court of Appeals of Virginia as being a purely economic measure looking to the fixing of prices. So, in *Lehman* v. *State Board of Public Accountancy*, 263 U. S. 394, this Court upheld a state statute providing for the issuance of certificates of registration to qualified persons as certified public accountants and to cancel any registration for un-

professional conduct. The aim and purpose to secure qualified public accountants fixed the limitations of the Act.

The appellants were compelled to apply for license or to decline to comply with the regulations of the Commission directing them to apply for license and comply generally with the Act. They could not apply for the benefits of the Act in the request for license and at the same time challenge the validity of the Act. Contending, as the applicants did, and do now, that the Milk Act is invalid upon its face, they were entitled to proceed in a court of equity to prevent the enforcement of penalties in violation of constitutional right. (*Smith* v. *Cahoon*, 283 U. S. 553.)

If the decision of the Supreme Court in *Lieberman* v. *Van Der Carr*, 199 U. S. 552, be considered as supporting the validity of a delegation of power, the decisions of this Court preceding it, to which we refer, and the cases recently decided, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter* v. *United States*, 295 U. S. 495, are in direct conflict to the extent that they dealt with a grant of legislative power without limitation in prescribing rules of conduct and standards for action. This Court in the *Schechter* case did not condemn the attempted delegation of legislative power because the administrative agency could act arbitrarily but because "the Congress is not permitted to abdicate or to transfer to others the essential legislative function with which it is thus vested." In other words, the Act was not defective because the discretion might be arbitrarily exercised, but because there was no measure or standard and without a measure or standard there was improper delegation of legislative function. This is emphasized in the first paragraph in the concurring opinion of Mr. Justice Cardozo in which he said:

> "The delegated power of legislation which has found expression in this Code is not canalized within the banks that keep it from overflowing. It is unconfined

and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388."

Again, he said that there is no standard definite or even proximate to which the legislation must conform.

The unconstitutionality of the Act on the ground of the improper delegation was not that any regulation had been or could be adopted which was or could be arbitrary or unreasonable but that the legislative function and responsibility with respect to it had been passed to another. As this Court said in *Wichita Railway & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 59, cited in the *Hot Oil Case*":

> "In creating such an administrative agency the legislature to prevent its being a pure delegation of legislative power must enjoin upon it certain courses of procedure and certain rules of decision in the performance of its function. * * *"

Whether the Milk and Cream Act passed by the General Assembly of Virginia vesting in an administrative board the power to fix prices and the determination of who shall be engaged in the business without rules or standards by which their action is to be determined, is valid, we submit presents a substantial constitutional question.

C. It is Contended That the District Court Erred in Not Holding That the Milk and Cream Act and the Rules and Regulations Adopted by the Milk Commission Were Invalid Because They Constituted an Interference on the Part of the State With Interstate Commerce.

In Section 1 of the Milk Act, the scope of the statute is indicated by definition. By subdivision II of Section 1, a "distributor" is defined as follows:

> "Persons wherever located or operating *whether within or without the Commonwealth, who purchase*

market or handle milk for resale as fluid milk in the Commonwealth of Virginia." (Italics supplied.)

Section 4 of the Act provides in part:

"No distributor • • • shall buy milk from producers or others for sale within the Commonwealth • • • unless such distributor is duly licensed under the provisions of this Act."

The same section further extends the effect of the Act with the provision:

"It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this Act."

The plain meaning of these provisions above quoted is that the distributor in an area designated by the Milk Commission shall not buy from a distributor beyond the borders of the Commonwealth unless the latter distributor shall have obtained from the Commission a license in addition to any other licenses required by existing laws of the Commonwealth or its municipalities (Section 7 of Chap. 357), and that the distributor beyond the Commonwealth may not sell if not so licensed, or that, if so licensed, it shall conform to the prices fixed by the Commission the purchase of fluid milk from producers or the sale thereof to distributors or others in Virginia; shall furnish to the Commission, as required, reports containing "such information as the Commission may require" (Section 4 (o) of Chapt. 357); and shall comply with all other rules, regulations and orders of the Commission applicable to "distributors" as thus defined, subject to incurring the penalties named for violations thereof.

The Act clearly attempts to prevent the free flow of milk into the market area whether it comes from other sections of the State, or whether it comes from Maryland or

the District of Columbia, or any other point beyond the State. The protection of a local market by the exclusion of foreign goods to which no objection is open other than circumstances of foreign competition is exactly the type of legislation against which the Commerce Clause of the Constitution is directed. So, despite the clearly existing emergency of the milk industry in New York which had previously been held to sustain regulation by price-fixing, this Court in *Baldwin* v. *Seelig*, 294 U. S. 511, held that the provisions of the New York Milk Control Act, the effect of which was to fix the price to be paid to producers beyond the borders of the State of New York, were a burden upon interstate commerce and in violation of Article I, Section 8, of the United States Constitution.

Section 11 (b) of the Milk Act provides for the levy of assessments upon producers and distributors not to exceed 2¢ per hundred pounds of milk handled, such assessments being authorized to meet the expense of the Milk Board in any market and of the Milk Commission. The further provision is made that all assessments shall be paid at the time that distributors pay the producers for the milk. Rules and regulations for the area here involved (Regulation No. 6, Appendix) provided for this assessment regardless of the source of the milk.

That interstate commerce may not be thus burdened, we refer to the decision of this Court in *Baldwin* v. *Seelig*, 294 U. S. 511, pp. 521-522. Neither the express provision of the Act that it shall not be construed as affecting interstate commerce nor the disavowal by the Milk Commission of intent to enforce assessment against the interstate commerce, will save the Act from condemnation.

The saving clause, Section 14, of the Virginia Milk and Cream Act, that no provision of the Act shall be construed as to apply to foreign or interstate commerce, except insofar as the same may be effective under the Constitution and

laws of the United States, will not protect the appellants unless and until it is determined that the acts complained of or threatened will interfere with interstate commerce and are therefore within the saving clause. The further question must be settled as to whether the provisions of the Act and the regulations, if found to interfere with interstate commerce, are separable provisions.

Whether the Virginia Milk and Cream Act and the regulations made pursuant thereto, which we sought to be enforced against the appellants, constitute an interference with interstate commerce, presents a substantial question which, together with other Federal questions here involved, should be passed upon by this Court.

VII.

Cases Believed to Sustain Jurisdiction.

In support of their contention that the District Court erred in holding that the Act of the General Assembly of Virginia was a proper exercise of the police power, appellants rely upon the following cases:

Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194;
Borden's Farm Products Co. v. *Ten Eyck*, 297 U. S. 251;
Wolf Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522;
Fairmount Creamery Co. v. *Minnesota*, 274 U. S. 1;
Williams v. *Standard Oil Co.*, 278 U. S. 235;
Tyson, et als. v. *Banton*, 273 U. S. 418;
New State Ice Co. v. *Liebmann*, 284 U. S. 262;
Block v. *Hirsh*, 256 U. S. 135;
Morehead v. *New York*, 80 L. Ed. 921 (1936).

In support of their contention that the District Court erred in failing to hold that the Virginia Milk Act was in-

valid as an improper delegation of legislative power to the Milk Commission, and in holding that the power conferred upon the Commission involved a denial of equal protection of the laws and a denial of due process in contravention of the Fourteenth Amendment to the Constitution of the United States, appellants rely upon the following cases:

Panama Refining Co. v. *Ryan,* 293 U. S. 388;
Schechter Corporation v. *United States,* 295 U. S. 495;
Yick Wo v. *Hopkins,* 118 U. S. 366;
Barbier v. *Connolly,* 113 U. S. 27;
Wichita Railway & Light Co. v. *Public Utilities Commission,* 260 U. S. 48, 59;
Mutual Film Corporation v. *Ohio Industrial Commission,* 236 U. S. 230, 245;
Eubank v. *City of Richmond,* 226 U. S. 137;
Thompson v. *Smith,* 155 Va. 367;
Taylor v. *Smith,* 140 Va. 217;

In support of their contention that the District Court erred in not holding that the Virginia Milk and Cream Act and the rules and regulations adopted by the Commission were invalid because they constitute an interference on the part of the State with interstate commerce, the appellants rely upon:

Baldwin v. *Seelig,* 294 U. S. 511.

It is respectfully submitted, in view of the foregoing substantial questions and the express provisions of Section 266 of the Judicial Code, as amended, U. S. Code Title 28, Section 380, that this Court has jurisdiction.

E. Randolph Williams,
T. Justin Moore,
Philip W. Rosenfeld,
Counsel for Appellants.

Milk and Cream Act.

AN ACT to Provide for the Supervision, Regulation and Control of the Production, Processing, Transportation, Storage, Distribution, and Sale of Milk and Cream; to Create a Milk Commission and Local Milk Boards and to Define and Provide for the Functions, Duties and Powers Thereof.

Reprinted from Acts of Assembly, Session 1934.

[Chapter 357.]

Richmond Division of Purchase and Printing, 1935.

Milk and Cream Act

CHAP. 357.—AN ACT to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution, and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and the members, officers, agents and employees thereof; to provide for licensing processors, bottlers, wholesalers, distributors, and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder and to impose penalties for violation of the provisions of this act.

[H B 396.]

Approved March 29, 1934.

Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to pur-

chase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political sub-divisions thereof; and

Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transporation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore,

1. Be it enacted by the General Assembly of Virginia, as follows:

Section 1. Definitions.—As used in this act, unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

"Person" means any person, firm, corporation or association.

"Commission" means the milk commission created by this act.

"Distributor" means any of the following persons engaged in the business of distributing, marketing, or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the Commonwealth of Virginia:

I. Persons, irrespective of whether any such person is a producer:

(a) who pasteurize or bottle milk or process milk into fluid milk;

(b) who sell and/or market fluid milk at wholesale or retail

(1) to hotels, restaurants, stores or other establishments for consumption on the premises

(2) to stores or other establishments for resale, or

(3) to consumers;

(c) who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises.

II. Persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market or handle milk for resale as fluid milk in the Commonwealth of Virginia.

"Producer" means any person, irrespective of whether any such person is also a distributor, who produces milk for sale as fluid milk in the Commonwealth of Virginia.

"Producer-distributor" means a distributor who handles only milk produced by himself.

"Consumer" means any person, other than a milk distributor who purchases milk for human consumption.

"Market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area.

"Licensee" means a licensed milk distributor.

"Milk" means the clean lacteal secretion obtained by the complete milking of one or more healthy cows properly fed, housed and kept; including milk that is cooled, pasteurized, standardized or otherwise processed with a view of selling it as fluid milk, cream, buttermilk (either cultured or natural buttermilk, and including cultured whole milk in its several trade forms) and skimmed milk; said term excludes the lacteal secretion of one or more dairy animals where lacteal secretion is sold or intended to be sold for any other purpose.

"Subsidiary" means any person of, or over whom or which a distributor or an affiliate of a distributor has, or several distributors collectively have, either directly or in-

indirectly, actual or legal control, whether by stock ownership or in any other manner.

"Affiliate" means any person and/or subsidiary thereof, who has, either directly or indirectly, actual or legal control, over a distributor, whether by stock ownership or in any other manner.

"Board" means the local agency authorized by this act to administer the operation of the act in each market area operating under the provisions of this act, to be known as the "milk board" of the particular market area in which it functions.

"Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence, or other data, pertaining to the business of the person in question.

"Health authorities" includes the State Board of Health, the Virginia Dairy and Food Division of the State Department of Agriculture and Immigration and the Director thereof, and the local health authorities.

"Sanitary regulations" includes all laws and ordinances relating to the production, handling, transportation, distribution and sale of milk and, so far as applicable thereto, the State sanitary code and lawful regulations adopted by the dairy and food divisions, or by the board of health of any county or municipality.

SECTION 2. Milk Commission.—(a) There is hereby created a Milk Commission, consisting of three members, two of whom shall be producers of milk who are not directly or indirectly engaged in the distribution thereof, and the third member shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom, who shall be appointed by the Governor of Virginia to hold office at the pleasure of the Governor and may be removed at any time by the Governor. Any vacancies occurring shall be filled by appointment by the Governor. One member of said commission shall act as chairman, as designated by the Governor. The technical and other services for such commission shall be performed, so far as practicable, by forces and officers in the Department of Agriculture and Immigration, the Virginia Agricultural

Extension Division of the Virginia Agricultural Experiment Station, without additional compensation. The Milk Commission may appoint and, at pleasure, remove the secretary of the Milk Commission and any such additional technical and other assistants and employees as may be necessary to carry out the provisions of this act, and to prescribe their powers and duties.

(b) The members of the Milk Commission shall be paid each the sum of ten dollars per day for each day actually spent in the performance of their official duties, plus their actual and necessary expenses.

(c) The commission shall fix the compensation of the secretary of the Milk Commission and other employees.

(d) The secretary shall, subject to the limitations herein contained and the rules and regulations of the commission, enforce the provisions of this act, but no official act shall be taken, rule or regulation be promulgated, or official order made or enforced, with respect to the provisions of this act, without the approval of the majority of the members of the commission.

(e) The principal offices of the commission shall be in the city of Richmond, in rooms assigned by the Director of the Division of Grounds and Buildings.

(f) Two members of the commission shall constitute a quorum.

SECTION 3. Powers.—The commission is hereby declared to be an instrumentality of the Commonwealth, vested with power:

(a) To confer and co-operate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this act, and to enter into a compact or compacts for such uniform system of milk control.

(b) To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia.

(c) To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

(d) To act as mediator or arbiter in any controversial issue that may arise among or between milk producers and distributors, as between themselves, or that may arise between them as groups.

(e) To examine into the business, books and accounts of any milk producer, association of producers or milk distributors, their affiliates or subsidiaries; to issue subpœnas to milk producers, associations of producers, and milk distributors, and to require them to produce their records, books and accounts; to subpœna any other person from whom information is desired.

(f) To take depositions of witnesses within, or without, the Commonwealth. Any member of the commission, or any employee designated by the commission, may administer oaths to witnesses and sign and issue subpœnas.

(g) To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act. Every rule or order of the commission shall be posted for inspection in the main office of the commission, and a certified copy filed in the office of the Commissioner of Agriculture. An order, applying only to a person or persons named therein, shall be served on the person or persons affected. An order herein required to be served, shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope, with postage prepaid, to each person affected thereby; or, in the case of a corporation, to any officer or agent of the corporation upon whom legal process may be served. The posting in the main office of the commission of any rule and of any order, not herein required to be served, and such filing in the office of the Commissioner of Agriculture, shall consti-

tute due and sufficient notice to all persons affected by such rule or order.

(h) The operation and effect of any provision of this act conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this act of a specific power or powers.

(i) The commission shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market.

The commission may on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of the Commonwealth of Virginia, supplying in the judgment of the commission a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission may withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the commission determines that it will be to the public interest to withdraw the exercise of its powers from such market. The commission may on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of Virginia, supplying in the judgment of the commission, a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors distributing a substantial pro-

portion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly.

(j) The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public.

(k) The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the Commonwealth.

(l) Any member of the commission, or employee designated for the purpose, shall have access to, and may enter at all reasonable hours, all places where milk is stored, bottled or manufactured into food products. Any member of this board, or designated employee shall have the power to inspect books and records in any place within the Commonwealth for the purpose of ascertaining facts to enable

the board to administer this act, and all such information shall be confidential unless the parties concerned agree to its being given out. The commission may combine such information for any market or markets and make it public.

(m) The commission may define what shall constitute á natural market area and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; provided, that producers, producer-distributors, or their successors now shipping milk to any market may continue so to do until they voluntarily discontinue shipping to the designated milk market.

(n) The commission may delegate such of the powers given it by this act as it sees fit to the milk board in any particular market area, for the purpose of carrying out the provisions of this act within said market area.

(o) Each licensee shall, from time to time, as required by the commission, furnish to the commission verified reports containing such information as the commission may require.

SECTION 4. No distributor in a market in which the provisions of this act are in effect shall buy milk from producers, or others, for sale within the Commonwealth, or sell or distribute milk within the Commonwealth, unless such distributor is duly licensed under the provisions of this act. It shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by this act. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe it has previously been dealt in, or handled, in violation of the terms and provisions of this act.

SECTION 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

SECTION 6. Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals.

SECTION 7. The licenses required by this act shall be in addition to any other licenses required by existing laws of the Commonwealth of Virginia or by any municipal ordinance. Nothing in this act shall be construed to conflict with or repeal any laws now in force in the Commonwealth of Virginia relating to any board of health or sanitary code now in force in this Commonwealth or in any municipality thereof, nor any municipal ordinances relating to the inspection, grading, production, sale or distribution of milk.

SECTION 8. Any person failing or refusing to comply with any subpœna issued by the commission or pursuant to its authority, shall be deemed guilty of a misdemeanor, and upon conviction, may be punished by a fine not exceeding one hundred dollars or by imprisonment not exceeding ninety days, or both, and each day during which such violation shall continue shall be deemed a separate offense. In the event any person shall fail to comply with any rule, regulation or order of the commission, or obey any subpœna issued thereby, or in the event of the refusal of any witness to testify to any matter concerning which he lawfully may be interrogated by the commission or its representative, it shall be the duty of the hustings court of the city of Richmond, or judge thereof, upon application of the commission, to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpœna issued from said court, refusal to testify therein, or disobedience of an order or decree of such court. The proceedings herein authorized in the hustings court to compel obedience shall be in addition to the provisions of this section defining what shall constitute a misdemeanor and providing and prescribing the punishment therefor.

SECTION 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly

assessments, and the local milk boards shall pay the assessments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

SECTION 10. All receipts from assessments paid under this act shall be paid by the commission to the State Treasurer and shall be placed by the State Treasurer in the general fund to the credit of an account to be known as the "Milk Commission account" and such amount as may be necessary, and no more, hereby is appropriated out of such Milk Commission account for the payment of all expenses incurred by the Milk Commission in administering and enforcing this act.

SECTION 11. Local milk boards.—(a) Members. For the purpose of securing the benefits of this act, in any market area, the producers and distributors and producer-distributors in that market area shall establish a milk board of five members to carry out the provisions of this act in conjunction with the State Milk Commission. Each local milk board shall be composed of two representatives of the producers supplying milk to the market, one of whom shall be named by the producers' co-operative marketing association operating in the market, and in markets where the producers' co-operative market association handles the selling of fifty per centum or more of the milk, the association shall have the right to name both representatives of the producers on the milk board; and two representatives of the distributors operating in the market. In markets where producer-distributors handle fifty per cent or more of the milk used in the market the Milk Commission shall determine the representation of the producers, the producer-distributors and distributors on the milk board on a basis fair to all parties.

The Milk Commission shall appoint the fifth member of the milk board to represent the consumers and the public interest, who shall serve as chairman of the board. The representative of the consumers and the public interest shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom.

(b) Expenses.—The expenses of the milk board, including salaries and/or per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) sold by producers. The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board as necessary to cover its expenses. All assessments shall be paid at the time the distributors pay the producers for the milk. All officers and employees of the milk board who handle funds of the board, or who sign or countersign checks upon such funds, shall severally give bond in such amount and with such sureties as shall be determined by the milk board. The cost of such bonds shall be paid by the milk board and the milk board shall determine the amount and sufficiency of such bonds.

(c) Powers.—The milk board shall perform such functions as the Milk Commission shall delegate to it.

Section 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

Section 13. Penalties.—Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate

violation. Prosecutions for violating the provisions of this act shall be instituted by the Commonwealth's attorney of the Commonwealth, or otherwise, in any county or city of the Commonwealth of Virginia in which the provisions of this act are in effect.

SECTION 14. Saving clause.—No provision of this act shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto.

SECTION 15. Conflicting laws.—The making of marketing agreements between producers' co-operative marketing associations and distributors and producer-distributors under the provisions of this act shall not be deemed a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily nor shall the marketing contract or agreements between the association and the distributors and producer-distributors, or any agreements authorized in this act, be considered illegal or in restraint of trade. All laws or parts of laws in conflict with the provisions of this act are hereby repealed to the extent necessary for the full operation of this act.

SECTION 16. Constitutionality.—If any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

SECTION 17. Termination.—The period of public emergency during which this act shall be effective shall be until such date as the Legislature may, by joint resolution, designate to be the termination thereof, or if the Legislature be not in session the date so designated by a proclamation of the Governor.

2. An emergency existing, this act shall be in force from its passage.

COMMONWEALTH OF VIRGINIA

State Milk Commission,

Richmond.

Rules and Regulations for the Supervision and Control of the Arlington-Alexandria Milk Market.

Effective 12:01 a. m. April 1, 1936, and posted in the main office of the Commission and a certified copy filed in the office of the Commissioner of Agriculture in Richmond, Virginia.

Definitions.

As used in the rules and regulations, unless otherwise stated, and unless the subject clearly indicates otherwise. "Commission", "Distributor", "Producer", "Producer-distributor", "Consumer", "Licensee", "Milk", "Subsidiary", "Affiliate", "Boards", "Books", "Records", "Health Authorities", and "Sanitary Regulations", are clearly defined in the Milk and Cream Act, chapter 357, Acts of the Assembly, session 1934.

"Milk" means milk so designated by law, including ordinances applicable in the city of Alexandria.

"New Producer" means one who secures a permit from the Health Department, as required on this market, and has also secured permission from the Local Board to sell milk within the sales area after the effective date of these regulations.

"Delivery Period" means the calendar month.

"Basic Allotment" means the established quantity of milk or base set up by the Local Board for each producer on an equitable basis with all other producers for apportioning Class I sales among the producers. The board shall determine the period for fixing allotments which will be based on quantities sold during any given period.

"Basic Quantity" means the quantity of milk or cream each producer receives in Class I as determined by dividing the total sales of Class I by the total allotments and then applying this percentage to each allotment.

"Arlington-Alexandria Sales Area" means the territory included within the following boundaries:

Beginning at the junction of the western boundary of the Arlington County line and the potomac River, thence southwesterly along said county line to the corporate limits of Falls Church, continuing around the western boundary of the corporate limits of Falls Church to Highway 211. Thence northeasterly along Highway 211 to Highway 7. Thence southeasterly along Highway 7 to Highway 244. Then southwesterly along 244 to Road 613. Thence southeasterly and southwesterly along Road 613 to Road 644. Thence southwesterly along Road 644 to Road 635. Thence southeasterly along Road 635 to Road 611. Thence northeasterly along Road 611 to Road 633. Thence northeasterly along Road 633 to Road 628. Thence along Road 628 in a southerly and easterly direction to Road 626. Thence northeasterly along Road 626 to Road 629. Thence southerly along Road 629 to Road 626, thence easterly along Road 626 to Highway 235. Thence easterly in a straight line to the Potomac River. Thence northerly and westerly along the Virginia side of the Potomac River to the western boundary of the Arlington County line, the point of beginning.

"Arlington-Alexandria Production Area" means the territory included within the following boundaries:

Beginning at the junction of the Stafford and Prince William County line at the Potomac River. Thence northwesterly along said line to Highway 1. Thence southerly along Highway 1 to Highway 3. Thence westerly along Highway 3 to Highway 20. Thence westerly along Highway 20 to Highway 49. Thence southerly along Highway 49 to North Anna River. Thence westerly along said river to Highway 4. Thence northwesterly along Highway 4 to Highway 29. Thence northerly along Highway 29 to Highway 16. Thence northerly along said highway to Highway 211. Thence

northeasterly along said highway to Highway 3. Thence northerly along said highway to county line of Warren and Rappahannock. Thence northeasterly along said line to the Warren and Fauquier County line. Thence in the same direction to Clarke-Fauquier County line. Thence in the same direction along said line to the Clarke-Loudoun County line. Thence northeasterly along said line to the intersection of the West Virginia and Virginia state line. Thence northerly along said state line to the Potomac River. Thence down the Potomac River to the junction of the Stafford and Prince William County line, the point of beginning.

Provided, however, that those farms outside such boundaries from which on the effective date of the regulations milk is marketed for distribution as fluid milk in the sales area shall not be excluded from the production area.

REGULATION No. 1.

Minimum Prices to be Paid Producers for Milk.

A. Distributors shall pay producers, on or before the fifteenth day of each month following the close of each delivery period, the following prices for milk delivered in the Arlington-Alexandria Sales Area. All distributors shall pay the producers a differential, in addition to the schedule of prices set forth below for Class I Milk; they shall pay the producers an additional 6c per hundred pounds for each 1/10 of 1% above 4%, and shall deduct 6c per hundred pounds for each 1/10 of 1% below 4%.

Class I Milk	$3.08 per cwt. for 4% milk.
Class II Milk	The average price of 92 score butter in New York, for the current delivery period, as reported by the U. S. Dept. of Agri., multiplied by the per cent. of butterfat in the milk, plus 35¢ per cwt.

Class I Milk shall include all milk as follows:

(a) All milk for consumption or use sold by distributors in bulk or in bottles.

(b) All cream for consumption or use sold by distributors in bulk or in bottles.

(c) All cultured wholemilk for consumption or use sold by distributors in bulk or in bottles.

(d) All milk or cream used in chocolate milk.

(e) All milk or cream used in cottage cheese.

Class II Milk shall include all milk as follows:

(a) All milk used for manufacturing purposes.

B. The butterfat content of all milk delivered by each producer shall be determined by three or more tests made at approximately equal intervals during a delivery period. All testing for the butterfat content of milk and cream shall be made by the Babcock test and shall be subjected at all times to check tests made by a qualified representative of the Local Board.

C. A distributor shall not use in Class II, milk that can be used or disposed of in Class I. And no Class I or Class II milk can be purchased, brought in, or handled by distributors so long as local producers supply the demand for Classes I and II milk for this market.

Regulation No. 2.

Confidential Report to the Milk Board Chairman.

Each licensee in the Arlington-Alexandria Sales Area shall file with the chairman of the Arlington-Alexandria Milk Board on forms furnished by the board, on or before the tenth day of each month following the close of each delivery period, a report showing the following information for that period. This report shall be kept confidential and shall only be examined by the Local Board chairman or a

person authorized by the chairman, and the Commission or its authorized employee:

(a) The total weight of milk and/or cream received from each producer delivered to said distributor.

(b) The average butterfat test for each producer delivering milk and/or cream.

(c) The total weight and butterfat test of milk and/or cream purchased from other distributors.

(d) The total weight and average butterfat test that is sold in the following classifications: (1) Class I Milk (2) Class II Milk (3) Cultured wholemilk (4) Chocolate Milk (5) 18-22% cream and (6) 38-42% cream.

(e) Total weight and butterfat test of milk and/or cream sold to other distributors.

(f) The price per hundred paid for milk and/or cream from other distributors.

(g) The price per hundred received for milk and/or cream from other distributors.

Regulation No. 3.

Farm Basic Allotments.

A. Each distributor in the Arlington-Alexandria Sales Area shall file with the Local Board within ten days after being licensed to handle milk by the State Milk Commission, the basic allotment of each producer delivering milk to him. These allotments may be set up in their entirety or may be revised within the discretion of the Local Board. Basic allotments must be at all times set up and be on an equitable basis among all producers. The allotments of all producers shall be set up and made to include Class I Milk.

B. No distributor shall take on a new producer without the consent of the Local Milk Board.

C. Producers shall at all times deliver to their distributors all milk produced by them, except such milk as may

be needed for home consumption, and no producer shall have a basic allotment in more than one market or with more than one distributor on that market.

D. A new producer shall receive for his total deliveries, during his first four full delivery periods, Class II price for his milk. After that time his basic allotment shall be set up by the Milk Board on a basis equitable with the other producers.

E. Any producer who fails to deliver his basic quantity during the months of October, November, and December, shall have his basic allotment lowered by the Milk Board. The Board, however, shall have the authority to waive this requirement for sufficient cause of an emergency character.

F. A renter or tenant who is a producer may retain his allotment in the event he moves from one farm to another, provided he is the owner of the entire herd.

G. Application for the transfer of basic allotments must be accompanied by evidence showing a bona fide sale of the real estate which was used in the production of milk under the basic allotment in question.

Regulation No. 4.

Retail and Wholesale Selling Prices.

The following schedule of minimum prices shall prevail in the Arlington-Alexandria Sales Area:

		Retail	Wholesale
(a)	Milk 3.25–4.1% butterfat:		
	Gallons—bulk		38¢
	Quarts	13¢	11
	Pints	7	6
	Half-pints	5	3
(b)	Milk 4.11–5.25% butterfat:		
	Gallons—bulk		43¢
	Quarts	15¢	13
	Pints	8	7
	Half-pints	5½	4

		Retail	Wholesale
(c)	Cultured Wholemilk:		
	Gallons—bulk		38¢
	Quarts	13¢	11
	Pints	7	6
	Half-pints	5	3
(d)	Chocolate Milk:		
	Gallons—bulk		38¢
	Quarts	13¢	11
	Pints	7	6
	Half-pints	5	3
(e)	Cream 18–22% butterfat: (sweet or sour):		
	Gallons—bulk		$1.50
	Quarts	55¢	45
	Pints	32	28
	Half-pints	17	15
	Gills	10	9
(f)	Cream 38–42% butterfat (sweet or sour):		
	Gallons—bulk		$2.75
	Quarts	$1.10	85
	Pints	60	50
	Half-pints	34	30
	Gills	20	18

Regulation No. 5.

Rules of Fair Practice.

Each distributor in the Arlington-Alexandria Sales Area shall observe the following rules of fair practice:

A. The sale of articles under Regulation No. 4 shall be in containers or bottles of the size specified, and no milk and/or cream can be sold in excess of or below the butterfat content as is provided in paragraphs (a), (b), (e), and (f) of Regulation No. 4.

B. All prices listed in the retail price schedule shall apply on sales to consumers from wagons and stores.

C. The prices listed in the wholesale price schedule shall apply only on sales to hotels, restaurants, stores, hospitals, schools, licensed boarding houses, and other establishments having a merchant's license, where milk is resold for consumption whether on or off of the premises.

D. No distributor shall exchange new milk for milk previously sold or shall at any time take back milk from a store or any other place that buys milk for retail sale. All milk delivered by a distributor to a purchaser must be accounted for in the Class in which it is sold in the report of the distributor to the Local Board.

E. Nothing in this regulation shall be construed to prohibit a distributor from submitting bids asked for by any governing body of any municipality, county, state, or federal government, including relief agencies, charitable institutions, or any other agency entirely supported by the above mentioned governing bodies. Provided, however, that all such bids must reflect the cost plus a reasonable handling charge as set up under the regulations governing any particular sales area in which such institutions may be operating.

F. No distributor, his officer, employees, or agents, shall engage in any method or device whereby any article is sold or offered for sale at a price less than the price set up under Regulation 4, whether by discount, rebate, redeemable certificates, stamps, free service, merchandise, loans, installation of equipment, or combined price for such milk together with another commodity sold or offered for sale, credit beyond the usual course of business, or any other valuable consideration.

Regulation No. 6.

Assessments by the Milk Board.

Each distributor shall pay to the Milk Board all assessments levied on him by the Milk Board, (except on that milk which has been purchased from licensed distributors), and shall deduct and pay to the Milk Board all assessments levied by the Board on each producer delivering milk to

him. No assessment on producers shall exceed 2¢ per hundred pounds of milk, and no assessment on distributors shall exceed 2¢ per hundred pounds of milk. 1¢ per hundred pounds shall be levied and collected by the Milk Board on all milk received by a distributor and 1¢ per hundred on all milk sold or used by a distributor. Such assessment shall be collected on the fifteenth day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia.

In regard to milk sold by one distributor to another, commonly called "exchange milk", the first distributor shall be responsible for all assessments.

STATE MILK COMMISSION,

(Signed) By J. S. AGNEW,

Chairman.

Copy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

In Equity. No. 363.

Highland Farms Dairy, Incorporated, a Corporation, and Luther W. High, *Plaintiffs*,

vs.

J. S. Agnew, Chairman, and Kone Brugh and T. R. Snavely, as the Members of the Milk Commission of the Commonwealth of Virginia, *Defendants*.

(Argued July 30, 1936. Decided October 3, 1936.)

Before Soper, Circuit Judge, and Way and Pollard, District Judges.

Hunton, Williams, Anderson, Gay & Moor-, Philip W. Rosenfeld, Counsel for plaintiffs (E. Randolph Williams, T. Justin Moore, Stephen H. Simes and Philip W. Rosenfeld, of Counsel), and Edwin H. Gibson, Assistant Attorney General and John S. Barbour, Counsel for defendants.

I concur: Luther B. Way, U. S. D. J. Robt. N. Pollard, U. S. D. J.

Soper, *Circuit Judge:*

The plaintiffs in this suit in equity challenged the constitutionality of the Virginia Milk and Cream Act, ch. 357 of the Acts of the General Assembly of Virginia of 1934, and prayed for a temporary and permanent injunction enjoining the members of the State Milk Commission, a body created by the Act, from exercising the powers therein conferred upon it. A court of three judges was organized under the provisions of 26 U. S. C. A. 380 to consider the case.

Material provisions of the statute may be summarized as follows: The preamble declares that the prosperity and health of the people of the state depend to a substantial degree upon the production and distribution of milk and cream; that the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities which has broken down the orderly production and marketing of milk and cream; that unhealthful, unfair, unjust, destructive and demoralizing trade practices have grown up and are carried on in the production, sale and distribution of milk and cream in the state which impair the constant supply of pure wholesome milk to the inhabitants; and that in order to protect the well being of the people and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution and sale of milk and cream in the state should be supervised and controlled in the exercise of the police power of the state as a business affecting the public peace, health and welfare.

"Distributor" is defined by Section 1 to include amongst others, persons who sell or market milk at wholesale or retail, or who operate stores for the sale of milk at retail for consumption off the premises, and persons, wherever located or operating, whether within or without the state, who purchase, market or handle milk for resale in the state. "Market" means one or more cities, towns or villages of the state and the surrounding territory designated by the Commission as a natural marketing area.

Section 2 of the Act creates a state Milk Commission. Section 3 confers upon the Commission the power, amongst others, (b) to investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the state; (c) to supervise, regulate and control such operations in milk for consumption within the state; (g) to make and enforce rules and regulations necessary to carry out the purposes of the act; (m) to define what shall constitute a natural market area and fix the limits of the area within which milk shall be produced to supply any such market area; (i) to exercise its powers in any market after a public hearing has been held for

such market, and after the Commission determines that it would be to the public interest that it shall exercise its powers in such market. The hearing may be had upon its own motion or upon the application of producers supplying a substantial proportion of the milk consumed in the market or of distributors distributing a substantial proportion of the milk consumed in such market. The Commission may withdraw the exercise of its powers from any market after a public hearing has been held and the Commission determines that it will be to the public interest to do so. The Commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced and a majority of the distributors (measured by volume) of milk distributed in said market acting jointly. (j) The Commission may, after public hearing and investigation, fix the prices to be paid producers by distributors in any market and may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market. In determining the reasonableness of the prices to be charged, the Commission is to be guided by the cost of production and distribution, including compliance with sanitary regulations, operation and delivery charges, and the welfare of the public. The Commission may require all distributors in any market to be licensed by the Commission for the purpose of carrying out the provisions of the act. It may decline to grant any license and suspend or revoke a license upon due notice, and after hearing under Section 6 any order of the Commission in refusing to issue a license or suspending or revoking a license may be reviewed on appeal to the Supreme Court of Appeals.

Under Section 4, no distributor in any market in which the act is in effect shall buy milk from producers or others for sale within the State, or sell or distribute milk within the State unless such distributor is duly licensed under the act. It is unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed under the act.

Section 8 provides substantial penalties to be imposed upon any person found guilty of failing or refusing to com-

ply with any subpœna issued by the Commission. Section 9 provides that the Milk Commission shall prepare an annual budget and collect the sums required therefor from the local milk boards in the form of monthly assessments, which will not exceed 2¢ per hundred pounds of milk handled in each market. The Local Milk Boards, provided under Section 11, consisting of five members, are to be established by the producers and distributors in a market area to carry out the provisions of the act in conjunction with the State Milk Commission. The expenses of the Milk Board, including the assessment levied by the State Milk Commission, shall be met by an assessment of not over 2¢ per hundred pounds of milk handled by distributors, and not over 2¢ per hundred pounds sold by producers. Section 13 provides that any person violating any provision of the act or of any license issued by the Commission shall be guilty of a misdemeanor and punished by fine of $25. to $100. or imprisonment in jail for not less than thirty days or more than one year, or by both fine and imprisonment. Section 14 provides that no provision of the act shall apply or be construed to apply to foreign or interstate commerce unless the same may be effective pursuant to the Federal Constitution. Section 16 provides that if any part of the act shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby. Section 17 provides that the period of public emergency during which the act shall be effective shall be until such date as the legislature may designate to be the termination thereof, or if the legislature be not in session, the date so designated by a proclamation of the governor.

The parties have agreed upon a stipulation of facts from which it appears that the Highland Farms Dairy, Incorporated, is a Virginia corporation which has its principal place of business in the District of Columbia where it operates a creamery for the pasteurizing and processing of milk, all of which it sells under contract to the individual plaintiff, Luther W. High, a resident of the District of Columbia. High operates a group of retail stores for the sale of dairy products in Virginia, Maryland and the District of Columbia, and purchases all of the milk sold by

him in Virginia from the Highland Farms Dairy. The latter purchases its milk under contract from farmers and producers in Virginia, Maryland and the District of Columbia, for delivery to the creameries in Washington. About 20% of this milk is purchased from Virginia producers, substantially all of which is produced in an area which has been designated by the Milk Commission as the Arlington-Alexandria Production Area. All of this milk, when received at the dairy, is commingled with milk purchased elsewhere, and it is impossible to determine what portion of the milk eventually sold by High in the territory designated by the Milk Commission as the Arlington-Alexandria Sales Area was originally produced in the said production area.

High makes no delivery of milk, but sells it all for cash at retail in bottles to purchasers at his stores. It is therefore essential to his business that there be a differential between the price charged by him and the prices of other distributors who permit charge accounts and make deliveries. The bottled milk distributed by High in Virginia is sold to him in the District of Columbia but is delivered to his Virginia stores by the dairy trucks upon orders received by telephone.

On March 27, 1936, the State Milk Commission established the Arlington-Alexandria Milk Market, and fixed the prices at which milk should be sold therein. This was done after a public hearing at Richmond, Virginia, on February 20, 1936, which was called by the Commission at the request of the Virginia and Maryland Milk Producers' Association to consider the establishment of such a market. Notice of the meeting was advertised in two newspapers in the area affected from February 6, to February 17, 1936, two notices appearing in one paper and three in another. Consequently producers, consumers and distributors in the area generally had knowledge that the hearing was to be had. Neither of the plaintiffs, however, was present at the meeting or represented thereat. The Commission gave notice at the hearing that it would consult with any group with regard to the establishment and the regulations to be issued, and this offer was accepted by various individuals between the date

of the hearing and the establishment of the area. In establishing the market and the governing rules and regulations, the Commission considered not only the statements and testimony that were made at the public hearing, but also certain treatises upon the production and distribution of milk. The sales and production areas and the governing rules and regulations were finally made effective on June 1, 1936. Plaintiffs had knowledge of the establishment of the area and of the adoption of the rules and regulations, but continuously sold milk at prices lower than the minimums prescribed for wholesalers and retailers respectively in the regulations adopted. For example, the prices per quart fixed by the Commission for the sale of cultured whole milk at wholesale and retail and the prices actually charged therefor by the dairy to High at wholesale, and by High to consumers at retail, were as follows:

	Wholesale	Retail
Commission's price	11¢	13¢
Dairy's price in Washington	6¢	8¢
High's price in Virginia		8¢

A bill similar in purpose to the act finally passed by the Virginia legislature was introduced in the House of Delegates on February 19, 1934, but was rejected by a vote of that body on March 5, 1934. The bill, which eventually became the Milk and Cream Act, was introduced on March 10, 1934, the last day of the session, accompanied by a letter from the governor of the state urging its passage. It passed both houses of the legislature on that day, printings and constitutional readings being waived.

The original bill of complaint was filed herein on May 29, 1936, and prayed for a temporary restraining order enjoining the Milk Commission from exercising its powers in the Arlington-Alexandria Milk Market during the pendency of the action and until the application for interlocutory injunction could be heard. The District Judge, however, refused a restraining order upon the ground that there was no showing of a present danger of irreparable damage, without prejudice to the right of the plaintiff to make subsequent applications. High made no application for a license under

the act, and on June 6, 1936, the Commission threatened to invoke against him the remedy of injunction specified in Section 12 of the act wherein it is provided that if any person fails to comply with any rule or order of the Commission, the Hustings Court of the City of Richmond, upon application of the Commission, shall compel obedience by attachment proceedings for contempt. The amended bill of complaint was thereafter filed in which application for a temporary restraining order and an interlocutory and permanent injunction was renewed; and an answer having been filed, the case came before the court upon these applications.

The plaintiffs' contentions with reference to the constitutionality of the act may be summarized as follows:

(1) The act cannot be upheld as an emergency price fixing measure in the exercise of the police power of the state because (a) there was a total absence of any legislative investigation into the facts; and (b) the legislature did not determine that an emergency existed, but (1) delegated the power to the Commission to determine whether or not the emergency existed, and if so, in what parts of the state; and

(2) authorized the producers and distributors controlling a majority in volume of the milk in any market to put an end to the operation of the act therein; and (3) failed to fix a definite time limit to the operation of the act.

(II) The act is invalid because it contains a delegation of legislative power to the Milk Commission contrary to the state constitution to establish markets and exercise its powers of control over the sale of milk therein and to withdraw the exercise of its powers from such market, to fix prices of the sale of milk, and to issue and revoke licenses to persons to engage in the milk business without reference to any prescribed standard.

(III) The exercise of the powers conferred upon the Commission, as above set out, necessarily involved a denial of the equal protection of the laws and a denial of due process in contravention of the Fourteenth Amendment to the Federal Constitution.

(IV) The action of the Milk Commission in (1) establishing a market, (2) in fixing minimum prices and (3) in adopting rules and regulations, constituted a denial of due process because of procedural errors on the part of the Commission in that (1) the action was based in part on data not introduced in evidence at the public hearing and (2) no evidence as to the cost of the production of milk was taken at that hearing.

(V) The act and the regulations passed by the Milk Commission are invalid because they constitute an interference on the part of the state with interstate commerce in that (1) they required the Highland Farms Dairy, a corporation of the District of Columbia, doing no business in Virginia, to secure a license in order to engage in interstate commerce; (2) and fixed the prices to be paid by High to Highland Farms Dairy for milk sold to him by the corporation in the District of Columbia; and (3) authorized the Commission to levy an assessment on milk shipped in interstate commerce.

The authority of a state legislature in the exercise of the police power to regulate the price of milk through the agency of an administrative board is established by the decision of the Supreme Court in Nebbia *v.* New York, 291 U. S. 502. The act of the state legislature was upheld which established a milk control board with power, among other things, to fix the retail prices to be charged for milk for consumption off the premises where sold. The court held that the rights of property and of contract are not absolute and that the Fifth Amendment, in the field of federal activity, and the Fourteenth as respects state action, do not prohibit governmental regulation of private business for the public welfare, but require only that the laws shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object to be attained, that the private character of a business does not exempt it from price regulation in the common interest, and that the New York legislature, having found that the low price of milk in the state had led to a demoralization of the market and affected the health and prosperity of the

people, the legislature acted within the scope of its power in prescribing the regulation described. For later decisions of the Supreme Court see Borden's Co. *v.* Baldwin, 293 U. S. 194 and Borden's Co. *v.* Ten Eyck, 297 U. S. 251.

Of equal importance in the determination of the pending case is the decision of the Supreme Court of Appeals of Virginia in Reynolds *v.* Milk Commission of Virginia, 163 Va. 957, 179 S. E. 507, in which the constitutionality of the Virginia Milk Control Act was upheld by a divided court. It was held that there are no substantial differences between the Virginia Act and the New York Act, and that the Virginia Act does not contravene the Fourteenth Amendment of the Federal Constitution, or the similar provision found in Section 1, Article 1 of the Virginia Constitution, but, on the contrary, is a proper exercise of the police power of the state in the public interest in view of the uncontroverted finding by the Virginia legislature of an imperative need to regulate the milk industry in the state even to the extent of fixing prices so as to protect the industry from serious impairment or destruction.

The court declared that the state legislature was better qualified than the court to determine the necessity and degree of regulation of an industry, and that its conclusions should not be disturbed unless they are clearly arbitrary and unreasonable. It was pointed out that arbitrary regulations issued by the Board might be invalid without affecting the constitutionality of the act, and that if the Commission should promulgate such regulations, the courts would declare them to be void.

The court considered the argument that the power given to the Commission to make and enforce rules and regulations was a delegation of legislative power to enact prohibitory legislation operative only in certain areas defined by the Commission and showed that a similar provision had been upheld in the Nebbia case.

Similarly, State Milk Control Acts have been held valid as within the police power of the State in the following decisions of state courts. People *v.* Nebbia, 262 N. Y. 259; State *v.* Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116; State *ex rel.* Finnegan *v.* Lincoln Dairy (Wisc.), 265 N. W.

197; Albert *v.* Milk Control Board (Ind.), 200 N. E. 688; Rohrer *v.* Milk Control Board (Pa.), 186 Atl. 336; Franklin *v.* State (Ala.), 169 So. 295; Miami Home Milk Producers Assn. *v.* Milk Control Board (Fla.), 169 So. 541. In three states, the Supreme Court without questioning the extension of the police power to cover price fixing regulations by state boards under Milk Control Acts, have declared the local statutes invalid because of an improper delegation of legislative power. See Griffiths *v.* Robinson, 181 Wash. 438, 43 P. (2) 977; Md. Cooperative Milk Producers *v.* Miller (Md.), 182 Atl. 432; Van Winkle *v.* Fred Maier (Ore.), 49 P. (2) 1140.

Notwithstanding these decisions, the plaintiffs contend that the Virginia act is unconstitutional as a violation of the due process clause of the Fourteenth Amendment for reasons not considered in Reynolds *v.* the Milk Commission. It is conceded that the legislature may have had power to pass a milk control price fixing act, if the legislature had found that the circumstances of emergency described in the preamble of the act actually existed; but it is asserted that the legislature failed to make such a determination and left the matter to the uncontrolled discretion of the Milk Control Board. It is said that there was no investigation by legislative committee, such as preceded the passage of the New York Act, but the Virginia act was hastily passed on the last day of the legislative session; that under Section 3 (i) the act does not become effective in any marketing area until the commission, after public hearing, determines that it will be to the public interest to exercise its powers therein, and that the commission is authorized to withdraw from any market after a similar hearing and determination; that the failure of the legislature to exercise its own authority is further shown by the provision of Section 3 (i) which gives to a majority of the producers of milk produced and to a majority of the distributors in any market acting jointly the right to cause the Commission to withdraw from that market; and that finally, there was a lack of definite action on the part of the legislature because it made no provision for the termination of the act other than Section 17 which provides that the period

of public emergency, during which that act shall be effective, shall be until the legislature designates the termination, or if it be not in session, the date designated by the proclamation of the governor.

This construction of the act cannot in our opinion be upheld. We may not disregard the positive declarations of the preamble merely because there was no formal investigation by a legislative committee and the statute was passed on the last day of the session. Indeed the rejection of the measure proposed earlier in the session indicates that the subject had been considered with some deliberation. Nor is the interpretation contended for in accord with the decision of the Virginia court in Reynolds *v.* Milk Commission, which points to the legislative determination of fact in the preamble as indicating an imperative need of state control of the production and distribution of milk. Not only is this interpretation binding upon us as the construction of a state act by the highest court of the state, but it is in harmony with our understanding of the legislative intent. We do not think that the authority given to the Board to determine in what areas it should exercise its powers contradicts or nullifies the legislative finding, or amounts to an improper delegation of legislative power. It is merely left to the Board to ascertain whether trade practices, harmful to the public interest, are prevalent in a particular area, and if so, to exercise the power to make rules and regulations and fix prices for the milk produced and distributed therein. The New York act differed in that it was made effective generally, but broad discretion was conferred upon the State Milk Control Board under Section 312 of the act to investigate the reasonable costs and charges for producing milk and to fix the minimum prices to be paid to purchasers of milk in its various grades. Provisions quite similar to the Virginia act are found in the statutes passed in 1935 in Alabama, p. 204, Section 5; in Wisconsin, Chapter 58, Sections 3 (1) (c), 3 (3) (a) and (b); and in Indiana, Ch. 281, Section 15.

There is no impropriety in the legislative delegation of authority to the executive to act or withhold action in carrying out the legislative intent in conformity with principles

laid down in the governing law. Thus Congress may empower the President, when in his opinion the public safety shall require, to lay an embargo on ships in the ports of the United States. Field & Co. *v.* Clark, 143 U. S. 649, 683; or to discontinue the suspension of commercial intercourse with foreign countries, required by an act of Congress; or to suspend by proclamation the free introduction into this country of enumerated articles when satisfied that unreasonable exactions are imposed upon the products of the United States by the country producing them, or to increase or decrease tariff duties so as to equalize the differences between costs of production at home and abroad. Hampton & Co. *v.* United States, 276 U. S. 394. See also United States *v.* Grimaud, 220 U. S. 506, and Fallbrook *v.* Bradley, 164 U. S. 112.

Hence we reject the suggestion that the Arlington-Alexandria Milk Market was illegally established by the Milk Commission in the exercise of an arbitrary power and discretion conferred upon them by the legislature without any legislative standard of action to guide them. We also conclude that this action of the Commission is not invalidated because the legislature in Section 3 (i) directed the Commission to withdraw the exercise of its power from any market upon the written application of a majority of the producers and a majority of the distributors of milk, measured by volume, in said market acting jointly; or because the governor of the state was empowered by Section 17 of the act, if the legislature be not in session, to designate by proclamation the termination of the period of public emergency during which the act shall be effective. No attempt has been made in this case to exercise the powers so described, and we have no occasion to decide whether they may ever be lawfully exercised by the persons named. But even if these provisions are invalid because they contain no guide as to the conditions under which the powers conferred may be exercised, it does not follow that the legislature has not actually found that the emergency exists. The incorporation of invalid sections does not destroy the whole act, because it is provided in Section 16 thereof that if any section, clause, sentence or paragraph thereof be

declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

Having declared the emergency and the necessity for regulation of the business, the legislature was not without power to delegate to the Board the authority to limit the market areas, to fix the prices to be charged therein, and to issue and revoke licenses to persons engaged in the milk business. These questions did not pass unnoticed by the Virginia court in Reynolds *v.* Milk Commission, either in the majority or minority opinions, where references were made to the power of the board to make rules and regulations necessary to carry out the purposes of the act and to grant and refuse licenses, subject to the review of that court. It is clear that the court would not have sustained the act had the majority of the judges thought that an unconstitutional delegation of power had been granted. The New York act of 1933, Ch. 158, considered in the Nebbia case, provided in Section 312 (b) that the Board should fix prices, which might vary in different markets, and designate the markets to which the prices should be applicable. Prices fixed by the Board did vary as to classes of dealers and localities. See Nebbia *v.* New York, 291 U. S. 502, 520, 540; and it does not appear that the act was deemed to be invalid on this account either in the Supreme Court of the United States or the Court of Appeals of New York. See People *v.* Nebbia, 262 N. Y. 259. The question as to price was definitely decided adversely to the defendants' contention under the New Jersey Act in State *v.* Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116, 124, where it was held that the legislature having declared the general policy and set the standard to be followed, properly left it to the administrative agency to take proper steps to eliminate destructive trade practices and to fix prices with reference to the grade of milk, costs of production, marketing and transportation so as to permit a reasonable return to the producer and the milk dealers. A similar standard was set up in Section 3 (j) of the Virginia act. See also State *v.* Lincoln Dairy Co. (Wisc.), 265 N. W. 197; Albert *v.* Milk Control Board of Ind., 200 N. E. 688, 694; Rohrer *v.* Milk Control Board of Pa., 186 Atl. 337; Franklin *v.* State (Ala.), 169 So. 295; Miami Home Milk Pro-

ducers Assn. *v.* Milk Control Board (Fla.), 169 So. 541 Compare, Griffiths *v.* Robinson, 181 Wash., 438, 43 P. (2d) 977; Maryland Cooperative Milk Producers *v.* Miller (Md.), 182 Atl. 432; Vank Winkle *v.* Maier (Ore.), 49 P. (2) 1140.

In the pending case, the Milk Commission held a public hearing to consider the propriety of exercising its powers in the area affected, and subsequently outlined the Arlington-Alexandria Sales Area and the Arlington-Alexandria Production Area, and passed rules and regulations which undertook to control the production and distribution of milk and fixed the prices to be paid for the product. There is no distinction between the action thus taken in conformity with the standards laid down by the legislature and conduct which was approved in the cited cases.

The plaintiffs emphasize the license provisions of the act, contending that here, in any event, are provisions so devoid of legislative standard as to leave to the Commission the unrestricted power to grant or refuse a license to a dealer in milk in its arbitrary discretion; and it is contended that these provisions not only involve an unlawful delegation of power, but in their effect amount to a denial of due process of law guaranteed by the Fourteenth Amendment. The license provisions are as follows:

> Section 3. (k) The Commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing. The commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a particular market or markets within the commonwealth.
>
> Section 5. An application to the commission for a license to operate as a distributor shall be made by mail or otherwise within five days after the provisions of this act become effective in a market, and as to any distributor thereafter beginning business, before such

distributor shall begin such business therein. The application shall be made on blanks furnished by the commission for the purpose.

SECTION 6. Any order of the commission in refusing to issue a license, or suspending or revoking a license, may be reviewed on appeal to the Supreme Court of Appeals.

SECTION 8. * * * In the event any person shall fail to comply with any rule, regulation or order of the commission, * * * it shall be the duty of the Hustings Court of the City of Richmond, * * * upon application of the commission, to compel obedience by attachment proceedings for contempt. * * *

SECTION 12. In the event of violation of any provision of this act, in addition to any other remedy, the commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist.

SECTION 13. Penalties.—Any person violating any provision of this act or of any license issued by the commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment, and each day during which such violation shall continue shall be deemed a separate violation. * * *

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† No other Milk Control Act, to which our attention has been called, contains conditions of like breadth. The New York Act of 1933, for example, contains in Section 303 (3) specific terms listing the acts or omissions which justify the rejection or suspension of a license, such as unreasonable rejection by a distributor of milk purchased from a producer or failure to pay for milk purchased, or violating any provision of the act.

The stipulation shows that the Milk Commission has threatened to invoke against High the remedy by injunction provided in Section 12 of the act, so as to restrain him from continuing his business as a milk dealer without first having obtained the required license, and also from violating the regulations of the commission as to retail sale prices. It does not appear that High has ever made application for a license or intends so to do; and the only reasonable inference to be drawn from the institution and prosecution of this case is that the plaintiffs, regarding the act as unconstitutional, propose to continue their trade practices irrespective of its provisions.

On the other hand, no conditions or restrictions upon the grant of licenses have been imposed in the regulations of the Board, and there is no indication that a license would be withheld from any one willing to abide by the terms of the statute. In Reynolds *v.* Milk Commission, 179 S. E. 507, 514, it was said that the license provision was not challenged. It might be proper also in the pending case to disregard it in the absence of arbitrary and unreasonable conduct on the part of the commission, and of any evidence that such conduct is contemplated. Nevertheless, it is not inappropriate to point out that the license provisions of the act should not be interpreted to vest the Board with the absolute power to grant or refuse licenses, if any other reasonable instruction can be adopted. Such a grant of power would be invalid and the attempt to exercise it arbitrarily would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. Yick Wo *v.* Hopkins, 118 U. S. 356; Lieberman *v.* Van De Carr, 199 U. S. 552; Douglas *v.* Noble, 261 U. S. 165; Lehmann *v.* State Board of Public Accountancy, 263 U. S. 394.

In our opinion, the act is susceptible of a more reasonable interpretation. It was not the intent of the legislature to confer upon the administrative board the extraordinary power to determine at will who should and who should not engage in the distribution of milk, but rather to render available to the Milk Commission and the local boards a list of authorized distributors of milk and to enable the authorities more readily to supervise the business of distribu-

tion and to enforce the rules, regulations and orders promulgated by the Board. In the absence of provision to the contrary, it would appear to be the duty of the Board to issue a license to any distributor complying with the statute and to preserve his license until some violation of the act or of a regulation or order had taken place. Such a standard would be sufficient to sustain the act although less specific in detail than other similar statutes. In Lieberman *v.* Van De Carr, 199 U. S. 552, the Supreme Court considered a section of the Sanitary Code of New York City, which provided that no milk should be received for sale and delivered in the City of New York without a permit in writing from the Board of Health. It was objected that the statute devolved upon the Board of Health absolute and despotic power to grant or withhold permits to milk dealers and was therefore not due process of law. The Supreme Court, commenting on the decisions of the New York courts which indicated the power to issue or withhold permits must be used in the exercise of a reasonable discretion and that arbitrary action and unjust discrimination would not be tolerated, said:

> "That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people there can be no doubt."

After citing certain cases, the court continued:

> "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of

state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court."

In Smith *v.* Cahoon, 283 U. S. 553, 562, it was said:

> "The principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration."

See also Lehmann *v.* State Board of Public Accountancy, 263 U. S. 394; Continental Baking Co. *v.* Woodring, 286 U. S. 352, 366-7; The Problem of Apparently Unguided Administrative Discretion by Lewis Allen Sigler, 19 St. Louis L. R. 261, 291, *et seq.*

The cases we have cited also dispose of the contention that the enforcement of the act necessarily entails a denial to the plaintiffs of the equal protection of the laws and the due process of law in violation of the Fourteenth Amendment. Thus in Nebbia *v.* New York, *supra,* it was held that a storekeeper was not denied the equal protection of the laws by an order which required him, if he purchased his supply from a dealer, to buy and sell the product at a minimum price, whereas the dealer might buy his supplies from the farmer and sell them at lower prices, and that such an order was not on its face arbitrary or unreasonable, as there are obvious distinctions between the two sorts of merchants which might well justify a different treatment. Likewise, it was decided that there was no denial of due process in the general scheme of the act because the state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare and if laws passed to that end have a reasonable relation to the legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. (See pages 530-537.)

Nor does the failure of the legislature of Virginia to provide for an appeal to the courts from the decisions or orders of the Board in relation to such matters as the determination of market areas and the fixing of prices amount to a denial of due process. It is true that if a legislature attempts to make the findings of fact of its agencies conclusive, even though the findings are wrong and constitutional rights have been invaded, the legislative action is invalid, for the judicial power of the courts cannot thus be circumscribed. St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38; Ohio Valley Water Co. *v.* Ben Avon, 253 U. S. 287; Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418. But the statute under consideration does not attempt to circumscribe the powers of a court, and it is not invalid simply because it does not specifically provide for access to the courts. Such access always exists if there is any arbitrary action on the part of the legislature or of a legislative agency which deprives a citizen of his constitutional rights. See Prentis *v.* Atlantic Coast Line, 211 U. S. 210; Louisville & Nashville R. R. Co. *v.* Garrett, 231 U. S. 298, 310; Coal & Coke Ry. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613; Weimer *v.* Bunbury, 30 Michigan, 201.

It seems also to be suggested that the whole act violates the Fourteenth Amendment because of the penal provisions of Sections 8 and 13. Section 8 imposes a penalty not exceeding $100 or imprisonment not exceeding 90 days upon any person failing or refusing to comply with any subpœna issued by the Commission and each day during which the violation continues is deemed a separate offence. Section 13 imposes a penalty by fine of not less than $25 or more than $100 or imprisonment in jail for not less than thirty days nor more than one year, or both fine and imprisonment, upon any person violating any provision of the act or of any license issued by the Commission, and each day during which the violation continues is deemed a separate violation. No attempt has been made in this case to enforce a penalty under either section. Even if it be supposed that these penalties are so excessive in their cumulative effect that defense in a criminal case would not afford a reasonable opportunity to test the propriety of the action of the

commission, it does not follow that the whole act is invalid. The procedure to be followed with regard to such penalties, when the enforcement of the orders of a legislative agency or administrative body is resisted on constitutional grounds, is suggested by the decision in Oklahoma Operating Co. *v.* Love, 252 U. S. 331. Under the statute considered in that case, the order of the State Corporation Commission was not reviewable in any court of the state and the only opportunity for a judicial test was to disobey the order and to apply to the Supreme Court, meanwhile running the risk of the imposition of accumulating penalties, not exceeding $500 a day. It was held that the provision for the enforcement of the act by penalties was violative of the Fourteenth Amendment, and that the plaintiff was entitled to a temporary injunction in the federal court restraining the enforcement of the penalty pending the final hearing upon the constitutionality of the order. If, upon final hearing, the order should be found to be invalid, permanent injunction against the enforcement of the order should be issued, and likewise, if the order should be found to be lawful, permanent injunction should nevertheless be issued to restrain enforcement of penalties pendente lite, provided that it be found that the plaintiff had reasonable ground to contest the order. Compare Missouri Pac. R. Co. *v.* Nebraska, 217 U. S. 196; Wadley Southern R. Co. *v.* Georgia, 235 U. S. 651.

The plaintiffs also complain that the action of the Milk Board in establishing the market area and fixing the minimum prices for production and distribution of milk was not had in accordance with the provisions of the statute, and was taken in violation of due process of law. The point relates to the nature of the public hearing which the Commission conducted. Section 3 (i) provides that the Commission shall not exercise its power in a market until a public hearing has been held for such market and the Commission determines that it will be to the public interest to exercise its powers therein; and Section 3 (j) provides that the Commission, after public hearing and investigation, may fix the prices to be paid producers by distributors and to be charged in the wholesale and retail distribution of milk, taking into consideration in determining the reason-

ableness of the prices, the cost of production and distribution, and the welfare of the general public.

A public meeting was held in Richmond, Virginia, on February 20, 1936, at which were present a score of dairymen and milk producers and some discussion as to the establishment of the market area and the prices of milk took place. It is stipulated that thereafter the Commission established the area and the rules and regulations not only upon the basis of the information obtained by it at this public hearing, but also upon the basis of information subsequently furnished it by interested persons during the month of March, the Commission having announced at the hearing that it would receive additional communications. The Commission also took into consideration certain treatises which the Commission had in its files or received subsequent to the hearing bearing upon the general subject of the marketing of milk. It is contended that not only was the evidence presented at the hearing entirely inadequate to enable the commission to carry out the duties imposed upon it by the act, but that the commission violated the rules of proper procedure when it took into consideration material not offered at the hearing.

The plaintiffs particularly rely on the decision in Morgan *v.* United States, 56 S. Ct. 906, which dealt with the duty imposed upon the Secretary of Agriculture to grant a full hearing and receive evidence before fixing rates for stock yard services under the Packers' and Stock Yards' Act of 1921. It was held that while the order of the Secretary was legislative, the proceeding had special attributes, and that the Secretary was required to make his determination in accordance with the procedural requirements contemplated by the statute, including a full hearing and the reception of evidence adequate to support the necessary findings of fact. Attention was called to the provision of the Packers' and Stock Yards' Act which makes applicable to the jurisdiction, powers and duties of the secretary, all laws relating to the suspension or restraint of the enforcement of orders of the Interstate Commerce Commission. The cases cited by the Supreme Court show that it is well established that a proceeding of this character before the Inter-

state Commerce Commission has a quasi judicial character and that the usual incidents of due process applicable to an adversary proceeding must be followed.

But it is our view, expressed in the absence of a controlling interpretation by the state court, that these cases have no application to the sort of hearing contemplated by the Virginia Milk Control Act. The proceeding before the Milk Commission was not quasi judicial but legislative. It is true that the act made provision for a public hearing without which the Commission was not authorized either to exercise its powers in any market area or to fix prices; but this hearing was to be of the same nature as that held by a legislative committee in considering proposed legislation. The act contains no directions as to the kind of notice to be given, and evidently merely contemplated notice by advertisement to the general public. No other notice was feasible, considering the large number of persons engaged in production and distribution of milk. The commission was undoubtedly justified in the exercise of its legislative function in taking into consideration not only the facts presented at the public hearing, but those which came to it subsequently from interested parties or were disclosed by its own investigation into the facts and the literature bearing upon the subject. See State *v.* Newark Milk Co., 179 A. 116, 125-6; Norwegian Nitrogen Co. *v.* United States, 288 U. S. 296, 308.

Even if the commission's hearing was quasi-judicial, the plaintiffs have small ground to complain. Although wide publicity was given prior to the hearing, the plaintiffs failed to attend and offer evidence; nor have they since applied to the Board for a modification of this action on the ground that it was arbitrary or ill advised. The courts have quite generally taken the position that one who complains of the unreasonable character of rules and regulations adopted by an administrative board must seek relief from the board before applying to the courts. See Red "C" Oil Mfg. Co. *v.* Board of Agriculture, 222 U. S. 380, 394; Hegeman Farms Corp *v.* Baldwin, 293 U. S. 163, 172; Peterson Baking Co. *v.* Bryan, 290 U. S. 570, 575; Reynolds *v.* Milk Commission,

179 S. E. 507, 515; Rohrer *v.* Milk Control Board, 186 Atl. 326.

Finally, the complainants say that the act and the regulations in pursuance thereof are invalid because they impose a burden on interstate commerce in violation of Sections 8 and 10 of Article 1 of the Federal Constitution. The argument rests, so far as Section 8 is concerned, upon the interpretation of certain provisions of the act to mean that a distributor of milk in an area established by the Commission is forbidden to buy from a distributor located beyond the borders of the state unless the latter shall have first obtained a license from the Commission; and also that the distributor beyond the state, unless licensed, is forbidden to make such a sale; and that if the foreign distributor is licensed, he shall conform to the prices fixed by the commission and shall comply with its rules and regulations and orders, subject to incurring the penalties prescribed by the act. This interpretation is based upon the definition of "distributor" in Section 1 of the act to include persons, whereas located or operating, whether within or without the Commonwealth of Virginia, and upon the provisions of Section 4 that no distributor in a market in which the provisions of the act are in effect shall buy milk from producers or others for sale within the state, or sell milk within the state unless the distributor is duly licensed under the provisions of the act, and providing further that it shall be unlawful for a distributor to buy milk from or sell milk to a distributor who is not licensed as required by the act.

If the act is given this meaning, it is doubtless invalid as a direct and unconstitutional burden on interstate commerce. In Baldwin *v.* G. A. Seelig, 294 U. S. 511, the Supreme Court held that a law or regulation of the State of New York was invalid, as a violation of Article I, Sec. 8, Clause 3 of the Constitution, which prohibited the sale of milk imported from another state unless the price paid therein to the producer was equal to the minimum prescribed by New York for purchases from local producers. We think that the act does not have the meaning attributed it, although the language of the sections under discussion gives some support to the complainants' argument; for when the

act is considered as a whole, including the admonition of Section 14 that no provision of the act shall be construed to apply to foreign or interstate commerce except insofar as the same may be effective pursuant to the United States Constitution, it is seen that the act was not designed to apply to a distributor beyond the state either as to prices or licenses.

Section 3 (j) of the act gives the Commission power to establish markets and to fix prices to be paid to producers by distributors, and wholesale and retail prices to be charged by distributors therein. The term "Market" means any city or town of the commonwealth or two or more cities and towns and surrounding territory designated by the commission as a natural marketing area. Obviously the area designated is to be confined by the Commission to territory within the State of Virginia, and consequently the power of the commission to fix prices in any market is to be enforced only within the state.

Likewise, Section 3 (k) provides that the Commission may require all distributors in any market designated by the commission to be licensed by the commission, so that here also the powers of the commission are restricted to Virginia territory.

Sections I (II) and 4 are broader in their literal significance: but when it is borne in mind that the Dairy in the instant case is not required by the act to be licensed, or to sell at prices fixed by the commission, since it is located in Washington and is not a distributor in any market designated by the commission, it is seen that the act does not forbid High from purchasing milk from the Dairy in the District of Columbia, or fix the price which he shall there pay. Furthermore, even if the plaintiffs correctly construe these provisions of the act, the whole does not fall because Section 16 provides that if any section, clause, sentence or paragraph be declared unconstitutional, the remainder of the act shall not be effected thereby.

The violation of Section 10 of Article 1 of the Constitution complained of is that the act imposes a tax or assessment upon milk imported into Virginia and therefore without the consent of Congress, lays an impost or duty upon

imports not absolutely necessary for executing its inspection laws. The assessment complained of was provided to cover the expenses of the Milk Commission and the local Milk Boards to be appointed to carry out the purposes of the act. The relevant provisions of the act and of the regulations in pursuance thereof are as follows:

SECTION 9. The Milk Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly assessments, and the local milk boards shall pay the assessments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this act are in operation.

SECTION 11. (b) Expenses.—The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this act, and including the assessments levied by the State Milk Market Commission, shall be met by an assessment of not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk and/or cream (converted to terms of milk of four per cent butterfat) sold by producers.

REGULATION No. 6. Assessments by the Milk Board. —Each distributor shall pay to the Milk Board all assessments levied on him by the Milk Board (except on that milk which has been purchased from licensed distributors) and shall deduct and pay to the Milk Board all assessments levied by the Board on each producer delivering milk to him. No assessment on producers shall exceed 2¢ per hundred pounds of milk, and no assessment on distributors shall exceed 2¢ per hundred pounds of milk. 1¢ per hundred pounds of milk shall be levied and collected by the Milk Board on all milk received by a distributor and 1¢ per hundred on all milk sold or used by a distributor. Such assessment

> shall be collected on the fifteenth day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia.

It thus appears that the Milk Commission, in order to cover its own expenses, has directed the levy of an assessment of 1¢ per hundred pounds on milk received by a distributor and 1¢ per hundred pounds on milk sold by a distributor. The local milk board, when set up, would be empowered to levy an additional sum not exceeding the maximum provided in the act to cover its own expenses. The terms of these sections of the act and of Regulation 6, it is urged, would require the dairy in Washington, if licensed as a distributor to handle milk for sale in Virginia, to pay an assessment not exceeding 2¢ per hundred pounds on all milk sold by it to High in Washington and shipped by it in interstate commerce to his stores in Virginia. We need not stop to consider this point for as we have seen, the dairy is not required by the act to take a license.

However, it is also said that even if the dairy be not licensed as a distributor, nevertheless the assessment would bear upon interstate commerce, because High, purchasing all of the milk sold by him in Virginia from the dairy, would be required to pay an assessment thereon of not more than 2¢ per hundred pounds, an assessment he would not have to pay under Regulation 6 if he purchased his milk from a Virginia distributor. Under the law, High would not pay an assessment on milk purchased by him from a licensed distributor in Virginia, because the assessment would have already been paid by the latter; but if High should buy from a producer in Virginia, he would pay for the use of the Milk Commission 1¢ per hundred pounds, and the remainder of the assessment would be deducted from the price paid the producer. Even so, it is difficult to understand how interstate commerce would be burdened or interfered with as a practical matter. Obviously, the sales by the dairy to High in Washington, and the subsequent interstate shipment of the goods would not be curtailed if the dairy, not being subject to Virginia price regulation, could continue to

sell cultured whole milk at its wholesale price of 6¢ per quart as against 11¢ which a Virginia distributor would be required to charge. The assessment of 2¢ per hundred pounds paid by High in Virginia would be exactly the same as that borne by milk produced and distributed in Virginia; and the imposition of the assessment puts the merchandise shipped from Washington on equality with all other merchandise in the state, and constitutes no hindrance to the introduction of the goods from Washington into the state for sale upon the basis of equal competition with the local product.

Furthermore, the assessment is levied upon the goods after they have reached their destination in Virginia and the state has acquired the power to impose a tax or assessment upon them to defray the expenses of the administration of the law. It is well established that there is no burden upon interstate commerce from the imposition of a state tax upon goods which have come to rest in the state at the end of interstate transportation, provided that the state law levies the same tax on all goods of the same sort without regard to their origin. The prohibition contained in Article 1, Section 10, Paragraph 2 of the Constitution forbidding a state to lay imposts or duties on imports or exports is not applicable to such a statute and the validity thereof must be determined by deciding whether it amounts to a regulation of interstate commerce in violation of Article I, Section 8, Paragraph 3 of the Constitution. In Sonneborn Bros. *v.* Cureton, 262 U. S. 506, the Supreme Court was called upon to decide whether oil transported from New York to the warehouse of the taxpayer in Texas and there held for sale in Texas in original packages and subsequently sold in Texas in such packages, might be made the basis of an occupation tax based upon the gross amount of sales in the state, the tax applying to all wholesale dealers in oil engaged in making sales and delivery in Texas. The court said: (508).

> "Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had

> come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

The same doctrine was applied in Wiloil Corp. *v.* Pennsylvania, 294 U. S. 169, 175, where it was said:

> "Our decisions show that, if goods carried from one state have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. Woodruff *v.* Parham, 8 Wall. 123; Brown *v.* Houston, 114 U. S. 622, 632; American Steel & Wire Co. *v. Speed*, 192 U. S. 500, 519-522; Sonneborn Bros. *v.* Cureton, 262 U. S. 506. And as that rule applies whether the burden falls directly or indirectly (Banker Bros. Co. *v.* Pennsylvania, 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property."

We find no ground in this case for equitable relief, and therefore the application for temporary restraining order, and for interlocutory and permanent injunctions will be denied, and the bill of complaint will be dismissed.